2006

Pinnacle Homes Inc. v. Utah Labor Commission, Platinum Builders/Mel Beagley, Uninsured Employers Fund, Glen M. Ebmeyer : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

PINNACLE HOMES INC., Appellant/Petitioner, v. UTAH LABOR COMMISSION; PLATINUM BUILDERS/MEL BEAGLEY and/or UNINSURED EMPLOYERS FUND; and GLEN M EBMEYER, Appellees/Respondents.	Appeal No. 20060869 Labor Commission No. 2003919

REPLY BRIEF OF APPELLANT PINNACLE HOMES, INC.

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Most, if not all, of the essential facts in this case are undisputed. It is agreed that Mr. Ebemeyer (hereafter "Ebmeyer") was injured when he fell from the roof of a home while working as an employee of Platinum Builders/Mel Bagley (hereafter "Platinum"). The home was owned by Pinnacle Homes, Inc. (hereafter "Pinnacle"). Because Platinum did not carry workers compensation insurance, Ebmeyer included the homeowner, Pinnacle, as a party in the Labor Commission action.

The ALJ held, under UCA 34A-2-103(7), that Pinnacle was a statutory employer that "retained indirect control over [Ebmeyer]," and therefore, was liable under the worker's compensation claim. (AR 144). UCA 34A-2-103(7)(a) states:

> If any person who is an employer procures any work to be done wholly or in part for the employer by a contractor over whose work the employer retains supervision or control, and this work is a part or process in the trade or business of the employer, the contractor, all persons employed by the contractor . . . are considered employees of the original employer for the purposes of this chapter. . . .

The Appeals Board affirmed the holding of the ALJ, holding that Pinnacle was a statutory employer, and liable to Ebmeyer because it did not give written notice to its "worker's compensation insurance carrier" opting out of its statutory employer role pursuant to UCA 34A-2-104(4)(c).

Pinnacle appeals the Labor Commission's determination that it was a "statutory employer" that "retain[ed] supervision or control" over Ebmeyer, and that Ebmeyer's work was "a part or process" of Pinnacle's business, pursuant to UCA 34A-2-103(7)(a).

I. PINNACLE WAS NOT A STATUTORY EMPLOYER BECAUSE NOTICE WAS GIVEN.

Pinnacle is comprised of 3 officers, and no employees. (AR 218). Because of Pinnacle's lack of employees, it does not qualify as an employer under the Worker's Compensation Act.

Under the Act, "each person . . . and each independent contractor, who regularly employs one or more workers or operatives in the same business . . . is considered an employer under this chapter." UCA 34A-2-103(2)(a). However, the Act also states that "a corporation may elect not to include any director or officer of the corporation as an employee . . . [by] serv[ing] written notice upon its insurance carrier naming the persons to be excluded from coverage. . . A director or officer of a corporation is considered an employee . . . until the notice described . . . is given." UCA 34A-2-104(4)(a-c). Under the plain language of UCA 34A-2-104(4)(a-c), a corporation may eliminate its directors or officers as "employees." Under the plain language of UCA 34A-2-103(2)(a), a corporation without "employees" cannot be considered an "employer" under the relevant chapters of the Worker's Compensation Act.

Pinnacle had no "employees," was not an "employer" under the Worker's Compensation Act, and therefore, was not liable to Ebmeyer.

A. Pinnacle Provided the Written Notice Purportedly Required.

As set forth in the Appellant's Brief, the testimony shows that an "application" was "filed" with Pinnacle's insurance company informing the insurance company that Pinnacle "did not have employees." (Appellant's Brief, pg. 134; AR 227: P95 L23 to P98 L8). This application filed with the insurance company informing the insurance company that there were no Pinnacle employees satisfies the requirements of UCA 34A-2-

104(4)(b). The "application" was clearly written, which is evidenced further by the fact that it was "filed." And by informing the insurance company that there were no employees, the application likewise included the necessary information to inform the insurance company who was "to be excluded from coverage." All the requirements of UCA 34A-2-104(4)(a-c) were thereby met.

Appellees argue that this testimonial evidence should be ignored because it is purportedly "brief and ambiguous." (Brief of Respondent, pg 10). However, Appellee fails to present any argument to show why the brevity of the testimony disqualifies it as evidence. Appellee also fails to show why it considers the testimony is ambiguous. Further, at the hearing, the witness was available for cross-examination on any subject the Appellants felt was ambiguous. They raised no such issues in the cross examination. The testimony evidence on the record should not be disregarded without a justifiable basis for doing so. Ebmeyer's mere contention that the testimony is brief or vague is not sufficient basis to disregard the evidence.

The only evidence on the record shows that a written application was filed with the insurance company informing the insurance company that they were to exclude everyone involved in Pinnacle from any worker's compensation coverage. As a result, no workers compensation insurance was issued. The evidence shows that Pinnacle complied with UCA 34A-2-104(4)(a-c), and therefore, cannot be considered a statutory employer. The Labor Commission arbitrarily and capriciously, and without substantial evidence, determined that "Pinnacle did not submit written notice to its insurance carrier." (AR 218); See Drake v. Industrial Commission, 939 P.2d 177, 181 (Utah App. 1997).

II. PINNACLE WAS NOT A STATUTORY EMPLOYER BECAUSE IT HAD NO EMPLOYEES REQUIRING WORKER'S COMPENSATION INSURANCE.

Ebmeyer argues that Pinnacle was required to strictly comply with UCA 34A-2-104(4)(a-c), failed to do so, and therefore, is a statutory employer. He relies on the holding in Olsen v. Samuel McIntyre Inv. Co., 956 P.2d 257 (Utah 1998), but the reliance is misplaced and based upon a misunderstanding of the limits, purpose and rationale behind the holding. Therefore, even if Pinnacle had not complied with UCA 34A-2-104(4)(a-c), as argued in Section I above, Pinnacle still does not qualify as a statutory employer.

A. Olsen Is Not Applicable to the Case at Bar.

In Olsen, Mr. Olsen was an officer of a company. Id., at 258. That company held worker's compensation insurance with the Utah Worker's Compensation Fund. Id. Mr. Olsen attempted to opt out of the worker's compensation coverage by providing notice under the predecessor to UCA 34A-2-104(4). Id. Under the predecessor statute, Mr. Olsen was required to give written notice to *both* its insurance carrier, which as stated, was the Utah Worker's Compensation Fund, and the Industrial Commission. Id. Mr. Olsen gave non-written notice only to his insurance company, which then gave non-written notice to the Industrial Commission. Id. Mr. Olsen then died in a work related accident and his wife applied for worker's compensation. Id., at 258-259. The Supreme Court determined that even if the notice had been written, it was not given to both the insurance carrier and the Industrial Commission, and therefore, Mrs. Olsen was entitled to compensation. Id., at 261.

This case, however, is distinguishable from the case at bar, and under the facts of our case, does not entitle Ebmeyer to coverage. Importantly, contrary to Ebmeyer's contention, the facts in Olsen do show that there were additional employees of Mr. Olsen's company, each of whom would have been entitled to worker's compensation insurance. The Supreme Court notes that upon receiving Mr. Olsen's notice, his insurance carrier "*modified* the corporation's insurance policy to exclude Olsen, and *reduced* the premiums charged to the corporation." Id., at 258 (emphasis added).

In Olsen, the company's worker's compensation insurance policy clearly did not cease to exist when Mr. Olsen was excluded, but rather, was only modified. Further, the worker's compensation insurance policy premiums were not eliminated, but only reduced. Even though Mr. Olsen believed he had opted out, his company continued to maintain and pay for a worker's compensation policy, for the only reason such a policy would be maintained – to cover other employees/officers. None of these material facts or circumstances are present in the case at bar. The Labor Commission erred in applying the principles of Olsen in the case at bar.

B. All Pinnacle Employees Rejected Worker's Compensation Insurance Coverage. There Were No Employees Needing Coverage. There Was Also Never An Insurance Company to Which Notice Could Be Provided.

In the case at bar, in contrast to Olsen, there is no dispute that the officers intended to forego any workers compensation insurance coverage. Second, after the officers of Pinnacle opted out of coverage, there were no other employees of Pinnacle that could possibly have had, or needed, worker's compensation coverage. Third, in contrast to

Olsen, a worker's compensation policy never existed, and consequently, Pinnacle never had a worker's compensation insurance company to which it could provide notice. These differences materially affect the applicability of both UCA 34A-2-104(4) and Olsen to our case. Specifically, while the Court in Olsen held that the notice statute, the predecessor of UCA 34A-2-104(4), required that a specific type of notice be given to particular parties, it did so in recognition that the statute 1) *should* have been applied under the particular facts in Olsen, and 2) *could* have been complied with under the facts in Olsen. In the case at bar, there are no facts to suggest that the statute should have been applied, or could have been complied with.

i. UCA 34A-2-104(4) should not have been applied here.

The main purpose of the Worker's Compensation Act is to make sure that all employees have workers compensation coverage, including officers of a corporation. The Legislature, however, provided a mechanism to permit officers of such corporations to operate their corporations without purchasing worker's compensation insurance. To make sure no officers are unintentionally omitted from coverage, UCA 34A-2-104(4) allows the insurance carrier to cancel coverage only if the required written notice is received. This desire to avoid any unintentional omissions is consistent with the principle that the worker's compensation statutes should be construed in favor of providing coverage to the intended beneficiaries.

Clearly, the intended beneficiaries of UCA 34A-2-104(4) are the officers who either choose to opt out and thereby save money, or those that do not opt out and remain securely covered. Consequently, in Olsen, the question to be determined was whether

Mr. Olsen chose to opt out. In the absence of the written evidence required by the Legislature in UCA 34A-2-104(4), the Court interpreted the statute in favor of providing coverage to Mr. Olsen. UCA 34A-2-104(4) was perfectly applicable under the facts in Olsen, and its application fulfilled the purpose of the statute – to provide coverage for Mr. Olsen, an intended beneficiary of the statute. However, UCA 34A-2-104(4) is not applicable under the facts of the case at bar.

First, all of the officers of Pinnacle, the intended beneficiaries of the statute, agree that they were properly omitted from any workers compensation insurance coverage. Therefore, the purposes of the statute – allowing officers to opt out and protecting other officers from being unintentionally omitted – has been fulfilled. All the beneficiaries opted out and were correctly not provided coverage. As the Utah Supreme Court explained, a "statute should be considered in the light of the purpose it was designed to serve and *so applied as to carry out that purpose* if it can be done consistent with its language." Savage Industries, Inc. v. Utah State Tax Commission, 811 P.2d 664, ¶24 (Utah 1991)(emphasis added). The purpose of the statute is to protect the beneficiaries – the officers of Pinnacle. Those beneficiaries have admittedly been protected. Therefore, the purpose of the statute has been fulfilled. As explained by the Utah Supreme Court

> When the reason for the rule is gone, the rule should vanish with it. Apropos is the statement of Justice Holmes: "It is revolting to have no better reason for a rule than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Snyder v. Clune, 390 P.2d 915 (Utah 1964). The purpose of UCA 34A-2-104(4) was to protect the officers of Pinnacle. That protection was admittedly provided to the officers of Pinnacle. The need for UCA 34A-2-104(4) to be applied disappeared, and its application by the Labor Commission was, therefore, improper under both a correctness standard, as well as a reasonableness standard. See Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah App. 1997).

Second, the application of the statute by the ALJ violates the intended purpose of the statute. As explained above, the statute is expressly intended to benefit the officers of certain corporations by allowing them to opt out and save the corporation the costs of workers compensation insurance, or making sure that the officers have coverage if they choose not to opt out. By applying the statute in the circumstances here, the ALJ actually defeats the intended purpose of the statute. Instead of being permitted to operate without worker's compensation coverage and thereby save costs, which the statute is intended to permit, the Labor Commission has imposed costs upon the same parties the statute intended to free from such costs. Further, the Labor Commission has not merely imposed premium costs, but has imposed all the additional costs associated with Ebmeyer's injuries. Under the Labor Commission's rulings, and Ebmeyer's arguments, the intended beneficiaries of UCA 34A-2-104(4) are now the statute's principal victims.

Under these circumstances, the Utah Supreme Court's direction is particularly enlightening. It explained:

> Attempts to give [statutes] universal and literal application frequently lead to incongruous results which were never intended. When it is obvious that this is so, *the statute should not be so applied.* In order to give a statute its

> true meaning and significance it should be considered in the light of its background and the purpose sought to be accomplished, together with other aspects of the law which have a bearing on the problem involved.

Snyder v. Clune, 390 P.2d 915, 916 (Utah 1964)(emphasis added). The Labor Commission's application of the statute to the detriment of its intended beneficiaries was improper, incorrect, unreasonable, and in direct contradiction to the Legislature's intent. See Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah App. 1997).

Third, because UCA 34A-2-104(4)(a-c) is intended to secure rights to the officers of Pinnacle. Relevant here is the right of those officers not to be unintentionally omitted from worker's compensation coverage. If, however, those officers choose to waive those rights, then the application of the statute is irrelevant. If the statute was not complied with by the corporation, the officers have voluntarily waived their right to have the statute strictly complied with by the corporation. See Hertz v. Nordic Ltd., 761 P.2d 959, 962 (Utah App. 1988).

ii. UCA 34A-2-104(4) could not have been complied with under the facts here.

UCA 34A-2-104(4) states: "a corporation may elect not to include any director or officer of the corporation as an employee . . . [by] serv[ing] written notice upon its insurance carrier naming the persons to be excluded from coverage." UCA 34A-2-104(4)(a-c). The Labor Commission held that this statute must be strictly complied with. Consequently, as the Labor Commission held, in order to have complied with this statute, Pinnacle was required to give written notice to its "workers compensation insurance carrier." (AR 219).

This was an impossibility, however, because Pinnacle never had a worker's compensation insurance carrier. It could not, therefore, give its "worker's compensation insurance carrier" the notice purportedly required by the statute. It was impossible for Pinnacle to strictly comply with the statute, as applied by the Labor Commission. Consequently, the statute should not be applied under the facts of this case. See Green v. Nelson, 232 P.2d 776, 778 (Utah 1951).

Further, in Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980), the Court explained that "[s]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd." The Labor Commission's insistence that Pinnacle strictly comply by giving written notice to a *non-existent* worker's compensation insurance carrier is both "nonsensical" and "absurd." The Legislature did not intend to punish people for not performing the impossible.[1]

One member of the Labor Commission recognized that compliance was "nonsensical" and "absurd" because it would require Pinnacle to perform a useless ritual of retaining a worker's compensation insurance carrier, for the simple purpose of

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[1] Ebmeyer's argument that the Legislature intended such a result is purportedly based on UCA 31A-21-104(8). That statute, however, is irrelevant to the issue here, inasmuch as it does nothing more than *permit* a worker's compensation insurance carrier to issue a policy to a corporation which does not yet have employees, but expects to in the future. UCA 31A-21-104(8) does not in any way support the assertion that a corporation without employees, and not expecting to have any employees, is "required" to obtain worker's compensation insurance, as alleged by Ebmeyer. (Brief of Respondent, pg. 12). Such a statute would itself be "nonsensical or absurd." UCA 31A-21-104(1)-(8) is merely intended to set parameters for insurance company activities, specifically stating what they "may" and "may not" do. It does not state what a potential insured "must" do.

notifying that same worker's compensation insurance carrier that Pinnacle, in actuality, had no need for workers compensation insurance. (AR 220-221). This useless ritual is exactly the sort of "incongruous result" warned against by Snyder and Justice Holmes. Snyder, at 916.

It was "nonsensical," "absurd," unreasonable, and incorrect to apply UCA 34A-2-104(4)(a-c) to Pinnacle. See Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah App. 1997). The Labor Commission's decision, therefore, should be reversed.

III. PINNACLE WAS NOT A STATUTORY EMPLOYER. IT WAS MERELY AN OWNER, ACTING MERELY AS AN OWNER.

In addition to its lack of employees, Pinnacle was never a statutory employer because it lacked the necessary supervision and control over Platinum and Mr. Ebmeyer, required under UCA 34A-2-103(7)(a). Ebmeyer and the ALJ relied on Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986). The case at bar, however, shares none of the material facts upon which the Bennett case was decided, making Bennett inapplicable, and its application improper under both a correctness standard, as well as a reasonableness standard. See Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah App. 1997).

A. Bennett Is Not Applicable to the Case at Bar.

In Bennett, the Kimball Condominiums needed construction work performed. Bennett, at 428. It contracted with Matthews Construction as the general contractor. Id. Matthews Construction subcontracted with Johnson Brothers Construction, which in turn, had Bennett perform the work with another party, Russell. Id. Bennett was regularly

employed by Johnson Brothers Construction. Id. Bennett was injured during the work, and brought an action against both Johnson Brothers Construction and Matthews Construction. Id.

The Court first addressed the issue of whether Bennett was an employee of Johnson Brothers Construction. Id., at 429. It noted that the relevant factors as "actual supervision of the worker, the extent of the supervision, the method of payment, the furnishing of equipment for the worker, and the right to terminate the worker." Id., at 430. The Court held that Bennett was an employee of Johnson Brothers Construction because Johnson Brothers Construction:

> [E]xercised the right to control Bennett's job conduct. Furthermore, Johnson Brothers dealt with Bennett as an employee. . . . Johnson Brothers appeared twice in one day [on a $400 job] to oversee Bennett's performance. When Bennett was injured, Johnson Brothers provided the labor to fill in for Bennett. [Johnson Brothers] hired both Bennett . . . and Russell to do the job. It was not Bennett who hired Russell, as would have been the case if Bennett were an independent contractor. . . . [T]he pay was reduced, apparently because of [Bennett's] time off the job due to the accident.

After determining that Bennett was an employee of Johnson Brothers Construction, the Court then addressed whether Matthews Construction was the "statutory employer." Id., at 431. Before it did so, however, the Court correctly took as a fact that Matthews Construction was a "general contractor." Only after beginning with this assumption, did the Court proceeded to analyze whether as a "general contractor," Matthews Construction was also the "statutory employer." Id.

In the case at bar, Pinnacle was not a "general contractor." Ebmeyer admits that Pinnacle was not the general contractor. (Brief of Respondent, pg. 14). Even without this

admission, the facts show that Pinnacle was not the general contractor. (See Section III(B) below). The fact that Pinnacle was not a general contractor makes Bennett inapplicable. As the Court in Bennett emphasized, under UCA 35-1-42(2), now renumbered as UCA 34A-2-103(7)(a), "a *subcontractor's employee* is deemed an employee of the *general contractor* if (1) the general contractor retains some[2] supervision or control over the subcontractor's work, and (2) the work done by the subcontractor is a 'part or process in the trade or business of the employer.'" Id. (Emphasis in original). The entire "statutory employer" analysis in Bennett is based upon the fact that Matthews Construction, unlike Pinnacle, was undisputedly a "general contractor."

Even the language in Bennett relied upon by Ebmeyer makes clear that Bennett would only be applicable if Pinnacle had been a "general contractor." The Court in Bennett "require[d] only that the *general contractor* retain ultimate control over the project" in order to qualify as a "statutory employer." Id., at 432 (Emphasis added)(Brief of Respondent, pg. 13). However, Pinnacle is not, and never was, a "general contractor." Not being a "general contractor," Pinnacle could not exercise the necessary supervision or control required by the Court in Bennett.

B. Pinnacle Is Not a General Contractor, but Rather, Only an Owner.

Pinnacle is the owner of the property where the work was performed by Platinum and Ebmeyer. As such, Pinnacle's position in the case at bar is the equivalent to that of

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[2]The renumbered statute, UCA 34A-2-103(7)(a), does not include the word "some." It requires that simply that the general contractor "retain[] supervision or control."

Kimball Condominiums in Bennett. Pinnacle is not in the same position as Matthews Construction, which was hired as a general contractor by Kimball Condominiums. In the case at bar, Platinum, not Pinnacle, is the "general contractor" equivalent of Matthews Construction. Even if the "statutory employer" principles of Bennett applied, they would apply only so far as Platinum, the general contractor, and not Pinnacle, the owner.

There is no law to suggest that an owner that contracts with a contractor to have work performed, by virtue of that contract, becomes a general contractor. There is likewise no law to suggest that an owner becomes a statutory employer simply by contracting with a general contractor. If there were, not only would Kimball Condominiums have been the statutory employer in the Bennett case, but each and every owner with employees, even if those owners have opt out, who contracts with any contractor to have work performed, would be a statutory employer. And as a statutory employer, would necessarily be required to carry worker's compensation coverage even though it lacked employees needing coverage. For example, a father who purchased a fixer-upper home and paid his son to arrange for some professional plumbing and electrical work would be considered a "statutory employer," and therefore, would be required to carry worker's compensation coverage. There is nothing in the statute to suggest that the Legislature intended to impose such a burden on all such owners.

That owners were not intended to be considered statutory employers is evidence by a number of cases involving general contractors and subcontractors. In Smith v. Alfred Brown Co., 493 P.2d 994 (Utah 1972)(cited by Bennett) BYU hired a general contractor to conduct work on campus. An employee of a subcontractor was injured during the

work. The work was for the furtherance, of course, of BYU's business of running a University. However, the mere fact that BYU entered a contract to further its business, did not mean that BYU became a "statutory employer."

If the courts were to consider owners as "statutory employers," and unintended and overwhelming burden would be placed on owners who simply want to have work done. It would also directly contradict the purpose of the statute as stated by the Court in Bennett. The Court explained that:

> [S]tatutes of this kind [UCA 34A-2-103(7)(a)] were passed "to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible *principal contractor*, who has it within his power, in choosing subcontractors, to pass upon their *responsibility and insist upon appropriate compensation protection for their* workers" . . .

Bennett, at 431 (Emphasis added). It is the general or principal contractor that is to have the ultimate responsibility under these statutes, not the owner.

i. Even if Pinnacle could theoretically be a statutory employer, it was not one here because it did not retain control and supervision.

Even if owners were intended to be considered potential "statutory employers" required to obtain worker's compensation insurance coverage, Pinnacle still does not qualify as a "statutory employer" because it did not "retain control or supervision" over Platinum. See UCA 34A-2-103(7)(a). The Labor Commission's Appeals Board erred by never even addressing this issue.[3]

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[3]The Appeals Board denied the Motion for Review on the single issue of whether written notice was provided pursuant to UCA 34A-2-104(4)(a-c). It erred in not addressing the other requirements for finding Pinnacle as a statutory employer – namely

As discussed above, in Bennett, the Court discussed "control and supervision" in the context of a general contractor and determined that the general contractor "retain ultimate control over the project." Bennett, at 431-432. An owner, however, retains no such control. The owner's control is nothing more than the control one contracting party holds over the other contracting party. As the owner, Pinnacle had no authority to "control or supervise" the work of Platinum.

In Bennett, the general contractor, Matthews Construction, provided both material and heavy equipment for the project. Id., at 430. Also, as stated above, the court recognized that Matthews Construction was the general contractor, and that Johnson Brothers Construction was a subcontractor. It recognized that the nature of the general contractor/subcontractor relationship included the control and supervision over the subcontractor by the general contractor. The Court explained that "[a]lthough the construction process requires the general contractor to delegate to a greater or lesser degree to subcontractors, the general contractor remains responsible for successful completion of the entire project and of necessity retains the right to require that subcontractors perform according to specifications." Id., at 432.

The determination in Bennett that Matthews Construction retained control and supervision is inapplicable here. As admitted by Ebmeyer, Pinnacle was not the general contractor, which was the main fact upon which the Bennett determination was based.

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whether Platinum "retain[ed] control or supervision" over Platinum, and whether the construction of a building, a roof in particular, is "a part or process in the trade or business of" Pinnacle. See UCA 34A-2-103(7)(a).

(Brief of Respondent, pg. 14). Further, unlike the general contractor in Bennett, Pinnacle provided no materials for the project. (AR 227: P54, L10 – L13); See Mitchell v. Estate of Rice, 885 P.2d 820,821 (Utah App. 1994)(citing Harry L. Young & Sons, Inc. v. Ashton, 538 P.2d 316, 318 (Utah 1975)). Pinnacle provided no tools for the project. (AR 227: P54, L14 – L17); Id. Unlike a general contractor or employer, Pinnacle had no right to fire Ebmeyer, as it had contracted with Platinum. (AR 227 P76 L20-25, P78 L23 to P79 L6); Id. Pinnacle paid for a complete job, and did not pay wages to either Platinum or Ebmeyer. (AR 227 P80 L13-18); Id. Further, Pinnacle did not pay Ebmeyer directly. (AR 227: P54, L5 – L9). Ebmeyer admits he never received any directions from Pinnacle telling him to go to work. (AR 227: P54, L18 – L24). Pinnacle provided no training for the work to be performed. (AR 227: P57, L12 – L20). Ebmeyer admits that he never saw anyone from Pinnacle at any time at the job site upon which he was working when he suffered his accident. (AR 227: P72, L16 through P73, L6).

The facts make clear that Pinnacle did not have any right to direct or control the means by which Ebmeyer fulfilled the contract, and that its only control over Platinum was limited to that of a contracting party. (AR 227 P54 L18 to P56 L11); Id; Stricker v. Industrial Commission, 188 P 849, 851 (Utah 1920). In Christean v. Ind. Comm'n, 196 P.2d 502 (Utah 1948)(Emphasis added), the Utah Supreme Court explained the importance of this fact.

> The definition of an "independent contractor" is equally well settled. An independent contractor is one working for another who has no control *as to the means by which the work is accomplished.* . . . "[A]n independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to *his own methods and without being subject*

> *to the control of his employer except as to the result of the work.* . . . "[W]here a person lets out work to another under contract, preserving no control over the work or workman, the relation of contractor and contractee exists, and not that of master and servant". . .

Platinum, not Pinnacle, controlled the means by which the contract was to be performed. Ebmeyer admits that he was given instructions from Platinum, not Pinnacle, and that he conducted his work as directed by Platinum, not Pinnacle. (AR 227 P57 L21 to P58 L5). The preponderance of the evidence shows that Pinnacle's rights were limited to that of any owner – the right merely to demand performance of the contract as to the results, not as to the particular manner in which the contract was performed. See Stover Bedding Co., v. Industrial Commission, 107 P.2d 1027 (Utah 1940); Stricker v. Industrial Commission, 188 P 849, 851 (Utah 1920).

UCA 34A-2-103(7)(a)'s requirement that the employer "retain control or supervision" in order for worker's compensation liability exists is entirely consistent with the general principles of tort law requiring the same. The Restatement (Second) of Torts, section 414, which has been formally adopted by Utah, states:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

See Thompson v. Jess, 979 P.2d 322, 326 (Utah 1999). Comment C to section 414 restates the principles explained in Christean, stating:

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over *the manner in which the work is done*. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make

> suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

(Emphasis added). These tort principles are applicable to the case at bar. Pinnacle never retained any rights necessary for liability to be imposed, either under basic tort law or worker's compensation proceedings. This court should "reject [Ebmeyer's] suggestion that the simple act of hiring an independent contractor and communicating to the independent contractor the task required, or even specifying the time to perform the work and/or to complete the task, changes the nature of the relationship between the parties" from an independent contractor to a master servant relationship." See Lane-Hill v. Ruth, 910 P.2d 360 (Okla. 1995).

Being neither a general contractor, nor the master in a master/servant relationship, Pinnacle lacked the necessary "control and supervision" over Platinum and Ebmeyer to be considered a "statutory employer." Even if the Appeals Board of the Labor Commission had addressed this issue, the determination that Pinnacle retained control and supervision is not supported by substantial evidence, and should be reversed. See Drake v. Industrial Commission, 939 P.2d 177, 181 (Utah App. 1997).

ii. Even if Pinnacle could theoretically be a statutory employer, it was not one here because the construction was not "a part or process in the trade or business of" Pinnacle.

Even if owners were intended to be considered potential "statutory employers" and "retained control and supervision." Pinnacle still does not qualify as a "statutory employer" because the construction of a building, roofs in particular, is not "a part or

process in the trade or business of" Pinnacle. See UCA 34A-2-103(7)(a). The Labor Commission's Appeals Board erred by never even addressing this issue.[4]

The Supreme Court of Arizona has addressed the exact issue applicable here. Arizona, like Utah, requires that the employer "retain supervision and control," and also that the work entrusted to the subcontractor be a "part or process in the trade or business" of the employer before the statutory employer concept may be invoked. Young v. Environmental Air Products, Inc., 665 P.2d 40 (Ariz. 1983). In discussing the latter requirement, the Young court explained that the "test focuses on the more narrow issue of whether the activity is regular, ordinary or routine in the operation of the remote employer's business." Id., at 46. Young quoted Larson Workmen's Compensation Law as follows:

> Practically all of the cases of general interest interpreting this type of statute are addressed to one question: When is the subcontracted work part of the *regular* business of the statutory employer? . . . [W]ith a surprising degree of harmony, the cases applying these assorted phrases [i.e., "part of or process in"] agree upon the general rule of thumb that the statute covers all the situations in which work is accomplished which this employer, or employers in a similar business, would *ordinarily* do through employees . . . . In addition to the test based on regularity or predictability of the activity, and on its relation to the way this employer got this kind of job done in the past, a helpful additional test is that which asks whether this employer is equipped normally to handle this task, both as to skilled man power and as to tools.

Id., at 47 (quoting 1C Larson, section 49.12)(Emphasis in original). In Young, EAP manufactured sheet metal products and accessories. Id., at 42. It purchased a prefabricated metal building kit, and attempted to construct the building itself. Id. However, EAP did not have a contractor's license and was forced to hire a licensed contractor to construct

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[4]See footnote 3, above.

the rest of the building. Id., at 42-43. The sole question before the court was whether EAP was the statutory employer of the Plaintiffs, who were injured as a result of the improper bracing of the building. Id., at 43. In rejecting the assertion that EAP was a statutory employer, the Young court concluded that:

> [W]hile the construction of this building might have been necessary and expected part of EAP's business, it was not a part of the regular, ordinary and routine operations of EAP. Nor was it shown to be something that EAP or others in its trade or business routinely did through their own employees rather than through the services of independent contractors. EAP was not "equipped to handle this task." In fact, the construction of this building was the type of work which EAP was not permitted to do without a contractor's license. It did not possess such a license, and it was for this very reason that it entered into the arrangement with [the licensed contractor]. We hold, therefore, that the uncontroverted facts of this case require a finding that the construction of the factory building for EAP was not "part or process" of EAP's trade or business; as a result, EAP was not plaintiffs' statutory employer.

Id., at 47.

Similar to the facts in Young, "while the construction of this building might have been necessary and expected part of [Pinnacle's] business, it was not a part of the regular, ordinary and routine operations of [Pinnacle]." Id. The construction, including specifically the roofing, was not something Pinnacle "routinely did through their own employees rather than through the services of independent contractors." Id. Further, there was no evidence produced to show that Pinnacle was "equipped to handle this [construction/roofing] task." Id. There was no evidence presented that Pinnacle was permitted to do such construction/roofing work, or that it had a contractor's license. See Id. It was for this reason, as in Young, that Pinnacle contracted with Platinum. Id. Platinum had the contractor's license under which Ebmeyer worked. (AR 227 P58 L9-

19). Under such fact, the work performed by Platinum/Ebmeyer was not "a part or process in the trade or business of" Pinnacle. See UCA 34A-2-103(7)(a). Therefore, Pinnacle was not the statutory employer.

Even if the Appeals Board of the Labor Commission had addressed this issue, the determination that the work performed by Platinum/Ebmeyer was "a part or process in the trade or business of" Pinnacle is not supported by substantial evidence, and should be reversed. See Drake v. Industrial Commission, 939 P.2d 177, 181 (Utah App. 1997).

CONCLUSION

There is no substantial evidence to support the Appeals Board's conclusion that written notice was not provided to Pinnacle's insurance company informing the insurance company that all of the employees of Pinnacle opted out. In fact, the evidence before the Labor Commission clearly showed that a written document was submitted to the insurance company informing them of the fact that there were no employees requiring worker's compensation insurance.

Even had the notice not been given, that fact is irrelevant because the intended beneficiaries of the statute are the officers of Pinnacle, who agree that they were properly omitted from any worker's compensation coverage. It is obvious that the notice statute should never have been applied by the Labor Commission against its intended beneficiaries. Furthermore, the strict compliance with the notice statute, demanded by the Labor Commission was impossible. Pinnacle did not have a "worker's compensation insurance carrier" to which it could give the notice required by the Labor Commission.

One member of the Appeals Board of the Labor Commission recognized the absurdity of this requirement.

Even had the notice been required and not provided, Pinnacle is still not a statutory employer because it did not retain supervision and control over Platinum or Ebmeyer, either as a general contractor or employer. Pinnacle was the owner of the property. It contracted with Platinum to have work performed. Pinnacle retained no authority to direct the means by which the contract was performed, but only had the authority of any contracting party, to enforce the result.

Also, even if Pinnacle had retained control, it is still not a statutory employer because Platinum's and Ebmeyer's work, roofing in particular, is not "a part or process in the trade or business of" Pinnacle. Roofing is not an activity Pinnacle "*would normally undertake through [its] own regular employees.*" Young, at 46 (Emphasis in original)(quoting 1C Larson Workmen's Compensation Law, section 51.22, at 14-140).

DATED THIS 8 day of June, 2007.

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